IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

SA.No. 607 of 1994(E)

AS.92/1987 of ADDL.SUB COURT,ATTINGAL
OS.51/1985 of MUNSIFF COURT,VARKALA
.....

APPELLANT: ADDL.2ND APPELLANT:

MOHAMMED HANEEFA JAMEELA BEEVI,
PAYATTUVILAKATHU VEEDU,
VENKULAM DESO;M, EDAVA VILLAGE.

BY ADV. SRI.V.N.ACHUTHA KURUP (SR.)

RESPONDENTS: PLAINTIFFS & ADDL.RESPONDENTS:
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1. **MOHAMMED HANEEFA, ANSARI OF PAYATTUVILA VEEDU, VENKULAM DESOM, EDAVA VILLAGE.**

2. **MOHAMMED HANEEFA SUBAIDA BEEVI, CHARUVILA VEEDU, KUNNATHUKONAM, PALLICKAL VILLAGE,..DO....**

3. **MOHAMMED HANEEFA JAMEELA BEEVI, AZIZ MANZIL, EDAVA VILLAGE, ..DO... DESOM.**

4. **RASHEEDA BEEVI, PAYATTUVILAKATHU VEEDU, VENKULAM DESOM.**

BY ADV. SRI.SUDHEESH KUMAR)
SRI.SUNIL KUMAR A.G) for R1

SRI.N.GOVINDAN NAIR)
SRI.P.PARAMESWARAN NAIR)
SRI.P.THOMAS JOSEPH) for R3

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 22/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 607 OF 1994

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DATED THIS THE 22nd DAY OF OCTOBER, 2007

JUDGMENT

One of the legal heirs of deceased defendant in O.S.51 of 1985 on the file of Munsiff Court, Varkala is the appellant. Respondent is the plaintiff. Respondent is the son of the defendant. Appellant is his second wife. Plaint schedule property admittedly originally belonged to the defendant. Under Ext.A1 registered gift deed dated 7.6.1983, defendant gifted plaint schedule property to the respondent, reserving with him the right to take usufructs and also to collect the rentals from the building during his life-time. Subsequently, under Ext.A3 cancellation deed dated 28.1.1985, defendant cancelled Ext.A1 gift deed. Respondent instituted the suit seeking a declaration that Ext.A3 cancellation deed is void and is not binding on respondent or the plaint schedule property and under Ext.A1 gift deed, he has title to the plaint schedule property and he also sought a decree for permanent prohibitory injunction restraining defendant from obstructing his right over the plaint schedule property.

2. Defendant in the written statement contended that

Ext.A1 was executed with the intention that it will take effect only after his death and it was executed on the belief that respondent would maintain him and would protect his interest. It was contended that after the execution of Ext.A1, respondent turned his colour and started acting against defendant and therefore he was compelled to execute Ext.A3 cancellation deed and it is valid and respondent is not entitled to challenge the same. It was also contended that Ext.A1 was never executed as a gift deed and it was only a will, which would take effect after the death of defendant. But during his life-time, under Ext.A3, it was cancelled and therefore respondent did not derive any right. It was further contended that he has been in possession of the property and possession was not handed over to the respondent under Ext.A1 and therefore under Mahomedan law, Ext.A1 gift deed is void.

3. Learned Munsiff, on the evidence of PWs 1 to 6, Dws 1 to 3, Exts.A1 to A3 and Exts.B1 to B5, granted a decree in favour of respondent, holding that Ext.A1 gift deed was validly executed and it came into effect and was accepted by respondent and thereafter it cannot be cancelled under Ext.A3 and respondent has title to plaint schedule property under Ext.A1 and defendant is not entitled to alienate the property or cut and remove the

trees and he has only life interest to enjoy the properties during his life-time. Challenging the decree, defendant filed A.S.92 of 1987 before Sub Court, Attingal. On the death of defendant, appellant herein, his second wife got herself impleaded as second appellant. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

1)Whether Ext.A1 is a gift deed or a will.

2)When the recital in Ext.A1 shows that the donor can take yield from the property during his life-time and also entitled to do business in the shop in the properties and donee shall not alienate or encumber the property, whether Ext.A1 is a gift deed or in essence a will.

3)Whether recital in Ext.A1 shows that the possession was delivered and whether evidence show acceptance of the gift deed and if so whether respondent derived any right under Ext.A1.

5. Learned counsel appearing for appellant was heard. The respondents counsel was not present. The argument of learned counsel is that Ext.A1 was not executed by defendant as a gift deed and the intention of defendant was that it shall come into

effect only after his death and therefore though Ext.A1 was styled as a gift deed, it is only a will. It was also argued that the essentials of a gift by Mahomedan were not appreciated by courts below and there cannot be a valid gift by a Mohamedan unless there was delivery of possession and Ext.A1 establish that possession continued with the donor as donor is to take usufructs and also to conduct business in the building and on the evidence, courts below should have found that Ext.A1 gift deed was not acted upon and there was no delivery of possession, and so no valid gift as provided under Mahomedan Law and respondent did not derive any title under Ext.A1 and defendant is entitled to cancel the same as has been done under Ext.A3 and therefore findings of courts below are unsustainable.

6. Ext.A1 was admittedly executed by deceased defendant, the father of respondent. It is a registered gift deed. It was executed on 7.6.1983. The recital in Ext.A1 is to the effect that as defendant had given properties to all his other children, he had decided to give some properties to respondent and therefore treating his love and affection as consideration, defendant executed the gift deed in his favour, whereunder plaint schedule properties were gifted to respondent. Ext.A1 recites that the title of defendant over the said properties were divested by the

execution of the gift deed and transferred to the donee respondent. It also recites that the right to take usufructs from the property alone was retained with the donor during his life-time along with the right to conduct business in the shop building. It further provides that those rights will vest with the donee, on the death of the donor. Ext.A1 further recites that from that date onwards, donee is entitled to effect mutation and thereafter has to pay tax and also is entitled to effect improvements. Therefore subject to the right to take usufructs and to conduct business in the shop building retained with defendant all other rights were divested and vested on respondent. It is two years thereafter Ext.A3 cancellation deed was executed. What is stated in Ext.A3 is that as expected, respondent did not look after the defendant and therefore he decided to cancel Ext.A1 gift and it is cancelled. Courts below, on the evidence, found that Ext.A1 is a valid gift as provided under Mohamedan Law and under the gift deed, only the right to take usufructs and to conduct business in the shop building was reserved with the donor and contention of defendant that possession of property was not handed over is not correct. Relying on Ext.A2 tax receipt, it was found that subsequent to Ext.A1, tax was being paid by the donee respondent and

defendant has no right to cancel the gift deed by executing Ext.A3 and granted a decree in favour of respondent. The argument of learned counsel is that the said finding of courts below is not correct. It was argued that essentials of a valid gift under Mahomedan Law as provided under Section 149 are the declaration of gift by donor, acceptance of the gift by donee and delivery of possession of the subject matter of gift by donor to the donee and these essential ingredients were not established and so Ext.A1, gift is not valid.

7. The three essentials of a gift under the Mahomedan Law as provided under Section 149 are :

1)A declaration of gift by donor

2)An acceptance of the gift, express or implied, by or on behalf of the donee

3)Delivery of possession of the subject of the gift by donor to donee as provided under Section 150.

8. Under Section 150 of Principle of Mohammedan Law by Mulla, delivery of possession which is one of the essential ingredient is described as follows:-

> “It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is

> susceptible. As observed by the Judicial Committee, “the taking of possession of the subject matter of the gift by the donee, either actually or constructively” is necessary to complete a gift.”.

It is admitted case that defendant and respondent were residing in the property covered under Ext.A1 gift deed. The question in such a case is whether it is necessary for the donor to part with possession of the property before creating a valid gift. The position has been considered in Mulla's Principles of Mahomedan Law 16th Edition at Page 162. Thus,

> “No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift”.

As illustration, learned Author has given a case of a gift by a Mohamedan lady to her son as follows:

> " A Mahomedan lady executed a deed of gift in favour of her son of a house in which she and her son were both living. The son continued to live with her in the house after the execution of the deed. The deed recited that possession was given to the son and the son paid Municipal taxes after the execution of the deed. Held that the gift was complete although there was no physical departure or formal entry: Abdul Razak V. Zainab Bi (1933) 63 Mad.L.J 887, 141 I.C.843, ('33) A..86".

9. The said illustration is applicable to the facts of this case.

10. Though it was argued that when the right to take usufructs was reserved with the donor, there cannot be a valid gift, the position is covered by the decision of a learned Single Judge of this court in **Mundayat Vadakke Purayil Kunhayissu and others V. Chirukandan and others** (1971

KLT 796). It reads:-

> “Muslim law recognises the distinction between the corpus(Ayn) of the property and its usufrcuts (Manafi). The disposal of the corpus of the property can only be absolute. But the right to the usufruct being independent of the corpus, even if corpus is transferred by a gift absolutely, the reservation of the right to the usufruct will not amount to a condition repugnant to the absolute grant of the corpus. There is essentially a distinction between reservation of the right to take the usufructs when an absolute gift of the corpus is made and the reservation of the right to be in possession when such an absolute gift of the corpus is made. In the latter case the gift will not be absolute as the corpus necessarily includes the possession of

> the property and when possession is reserved with the donor, there is limitation or condition on the absolute right granted, which under the Mohammadan Law would render the gift void. In the case before me the reservation is only of the usufructs and that is reserved for the life-time of the donor. The disposal of the corpus by way of gift is absolute. Therefore the gift would not be void".

11. A Division Bench of this court in **Khalid V. Sainabi** (1981 KLT 621) has also considered the question whether reservation of usufructs in favour of donor during his life-time with authority to collect rentals and profits would make the gift void. The decision of the Privy Council in **Nawazish Ali Khan V Ali Raza Khan** (AIR 1948 PC 34) was relied on which reads as follows:-

> "In general, Muslim Law draws no distinction between real and personal property.....What Muslim law does

recognise and insist upon, is the distinction between the corpus of the property itself(ayn) and the usufruct in the property(Manafi). Over the corpus of property the law recognises only absolute dominion, heritable and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion, the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests..... Their Lordships feel no doubt that in dealing with a gift under Muslim Law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected

> as repugnant; but if upon construction the gift is held to be one of a limited interest, the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest".

12. It was held that reservation of the usufructs in favour of donor during his life with liberty to collect rents and profits as agent of the donee, do not make gift void under the Mahomedan law. In the light of the decisions, appellant is not entitled to contend that because of the reservation of the right to take usufructs during the life-time of the donor, Ext.A1 gift deed is invalid.

13. Even the evidence of DW1 establish that as provided under Ext.A1, mutation were effected in the name of respondent donee on the strength of Ext.A1, after Ext.A1. It was also admitted by DW1 that he did not pay tax thereafter and it was being paid by the respondent establishing that gift deed was acted upon and was accepted by the donee. Though it was contended by defendant that gift deed was stolen by

respondent, custody of the gift deed with respondent is admitted. There is no evidence to prove that custody with the respondent was by committing theft. In such circumstances, courts below rightly found that under Ext.A1, respondent obtained title to the property under Ext.A1 which was accepted and acted upon. Therefore defendant is not entitled to cancel the same by executing Ext.A3. There is no merit in the appeal.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

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